IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

MONDAY, THE 29TH OCTOBER 2007 / 7TH KARTHIKA 1929

CRL.A.No. 1284 of 2004()

SC.315/1998 of ADDL. SESSIONS COURT (FAST TRACK-I), TRIVANDRUM
.....

APPELLANT: ACCUSED:
---

1. SHIBU, S/O. SURENDRAN,
SHIBU SADANAM, KAZHUVOOR, KANJIRAMKULAM VILLAGE.

2. SIVADASAN @ DASAN, S/O. SIVARAJAN
CHARUVILAPUTHEN VEEDU,
KAZHUVOOR DESOM.

BY ADV. SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENTS: COMPLAINANT & STATE:

THE STATE OF KERALA REPRESENTED BY
THE DIRECTOR GENERAL OF PROSECUTION,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 29/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.P.BALACHANDRAN, JJ.

CRL.A.No.1284 OF 2004

Dated 29th October, 2007

JUDGMENT

Koshy,J.

Appellants in this case were charge sheeted for offences punishable under Sections 143, 147, 148, 427, 449 and 302 read with Section 149 of the Indian Penal Code. Seven others were also charge-sheeted along with the appellants. Appellants are accused Nos.1 and 3. They were convicted and sentenced to undego imprisonment for life each with a fine of Rs.25,000/= each under Section 302 read with section 34 IPC . They were also convicted for offence punishable under section 449 read with section 34 IPC and sentenced to undergo rigorous imprisonment for five years each and to pay a fine of Rs.10,000/= each. Other accused were acquitted. The prosecution case was that deceased Madhu is the husband of PW1 and father of PW3. PW2 is the mother-in-law of the deceased. According to the prosecution, on several occasions quarrels took place between the accused persons on one faction and deceased Madhu and his friends on the other faction and they were living on inimical terms with regard to a dispute that arose regarding the management and ceremonies of a temple. While so, a quarrel took place between A1 and deceased Madhu (before one and a half months of the occurrence) at a place called Marappalam. During the first day festival

of the Oottara temple, somebody broken the wire of the mike drawn along the koonanvila road. A3 and other who were the office bearers of the said temple believed that it is deceased Madhu and his friends who had broken the wire. Therefore, A3 and others entertained enmity towards deceased Madhu due to the aforesaid reasons. It is also the prosecution case that 2-3 years prior to the date of occurrence, the deceased Madhu manhandled, the elder brother of A2, and therefore A2 also entertained enmity towards deceased Madhu. So, A1 to A9 in prosecution of their common object of causing the death of deceased Madhu formed themselves into an unlawful assembly being armed with deadly weapons like swords, chopper and wild sticks and thereafter on 19.03.1997 at about 9.30 p.m. A1 to A4 criminally trespassed into the house known as Kazhuvoor Tunduvila house at Kanjiramkulam village by A1 and A3 with swords and by A2 with a chopper and A1 on seeing CW12 who was taking food in his house uttered “kill him” and CW12 on hearing the same ran away, but A1 to A4 chased him and thereafter A1 to A4 along with A5 to A9 went towards the house of CW4, another friend of deceased Madhu who was residing on the western side of the house of CW12. CW4 on seeing A1 to A4 making the commotion reached on the western side of the house and concealed his presence in the darkness. Then A1 to A9

broke open the northern door of the house of CW4 known as Narayana Mandiram and committed mischief by destroying chairs and window glasses and thereafter destroyed two coconut plants and 14 plantains. Thereafter, A1 to A9 at 10.30 p.m. criminally trespassed into the courtyard of the tarwad house of PW1 known as Charuvila house bearing No.KJP 3/237 in Kanjiramkulam Village on the western side of the house of CW4 and thereafter A1 to A4 trespassed into the front varandah of the house with swords, chopper and sticks in their hands. Then A4 beat deceased Madhu with a wild stick on his buttocks who was at that time sitting in the front varandah of the house along with PWs 1 and 2 and then A1 dragged deceased Madhu from the front varandah of the house to the courtyard of the house. Then A4 beat him with wild sticks on the various parts of his body. A1 cut him with a dangerous sword on his leg and head and when PW1 attempted to obstruct him, A2 pushed her on the ground. Thereafter A1 to A9 dragged deceased Madhu to the eastern lane of the house and then after causing him to stand in the earthern bund, A1 and A3 cut him with swords on his leg and head and the other accused persons beat him with wild sticks. Thereafter they taken deceased Madhu to Pandarakuzhy Purambokku Lane and beat him and cut him and thereafter A1 to A9 taken him to the Plavila road which is 134

metres east from the said lane and then caused him to lay in the motorcycle being registration No.KRH 938, but deceased Madhu fell down and then A1 by asking whether “he did not die” stamped him on his chest. Thereafter, A1 to A9 caused deceased Madhu to lay across the motorcycle and A3 caught hold of him by sitting in the back seat of the motorcycle and A1 drove the motorcycle and then abandoned him in the road margin of the Vizhinjam-Poovar road at a place called Marappalam near the Oottara Sree Chidambaranath temple and that deceased Madhu succumbed to his injuries on 19.03.1997 at 12.30 in the night as a result of the fatal injuries inflicted by the accused persons on him and thereby committed offences punishable under the aforesaid sections.

2. PW1, wife of the deceased, who is an eye witness, went to the Kanjiramkulam police station on 20.03.1997 at 5 a.m. and lodged Ext.P1 F.I. Statement before PW17, the then Head Constable of police, Kanjiramkulam Police Station. Before going into the details of the case, we will first consider the postmortem certificate. Postmortem was conducted by PW6 doctor. Ext.P2 is the postmortem certificate. Postmortem was conducted on 20.3.1997 afternoon

at 2.15 p.m. The ante-mortem injuries noticed by the doctor in the postmortem certificate are as follows:

> "INJURIES (ANTE MORTEM)
>
> 1. Contusion 23x2x0.4 cm oblique on the back of upper trunk across the midline, with an area of central pallor (1.5 cm), the right upper end being 5cm behind the middle of right collar bone.
>
> 2. Contusion 32.x2.0.4 cm oblique on back of upper trunk across the midline and injury No.1, with an area of central pallor (1.5cm) the left upper end 6cm behind the outer end of left collar bone.
>
> 3. Contusion 29x2x0.3cm oblique on the back of trunk across the midline, with an area of central pallor (1.5cm) the right upper end 16 cm behind the outer end of right collar bone and the left lower end 4 cm to left of midline at a level 29cm above natal cleft.
>
> 4. Contusion 13x2 cm almost vertical on back of upper trunk, the upper end being 5 cm behind the outer end of right collar bone and the lower end merging with the injury below.
>
> 5. Contusion 10x2x0.3 cm oblique on right side of back of trunk, the right lower outer end merging with the lower end of injury No.4; 18cm below outer end of right collar bone at junction of injury No.2 & 4.
>
> 6. Contusion 28x2x0.3cm oblique across the lower part of trunk with central pallor of 1cm, the right lower outer end being 13 cm to right of

midline and 2 cm above rim of hip bone.

7. Contusion 8x2x0.4cm oblique on right side of back of chest, the lower inner end 4 cm to right of midline and parallel to injury No.3.

8. Contusion 8x5x0.4 cm on back and outer aspect of right arm 3 cm below tip of shoulder.

9. Contusion 5x2x0.4 cm horizontal over right upper arm with a central pallor of 1cm, 6cm below tip of shoulder and 1cm in front of injury No.8.

10. Abrasion 2.5x1.5 cm over the tip of right shoulder.

11. Contusion 3x3x1 cm on front of right arm 3 cm below level of injury No.9.

12. Contusion 3x1.5 cm on front of right arm 2 cm below injury No.11.

13. Contusion 4x2x0.4 cm on front and inner aspect of right arm 6cm in front of injury No.12.

14. Abraded contusion 3x2x0.2 cm on back of right elbow.

15. Contusion 6x2x0.3 cm on back and inner aspect of right forearm 1cm above the wrist.

16. Contusion 11x4x0.3 cm on back of right hand and little finger, 3cm above its tip.

17. Incised wound 1.5x0.2x0.2cm, oblique on inner aspect of right finger 7 cm above its root.

18. Multiple abrasions varying in size from 0.5x0.2 cm to 3.5x2 cm, in varying directions over an area 20 x 9 cm on back of right side of trunk,

18cm below top of shoulder and 8 cm to right of midline.

19. Multiple abrasions varying in size from 0.5x0.2 to 3x 1.5cm in varying directions over an area 10x6 cm on back of right side of trunk 7cm to right of midline and 10cm above level of natal cleft.

20. Abrasion 5x3 cm on back of trunk, 2cm to right of midline and 6cm above the natal cleft.

21. Abrasion 2x2 cm on back of trunk in midline 18cm above natal cleft.

22. Abrasion 1x1 cm on back of trunk in midline 1.5cm above injury No.21.

23. Abrasion 7x4.5cm oblique on left side of back of trunk, 2cm to left of midline and 7cm above level of natal cleft.

24. Abrasion 8x2 cm on back of left side of trunk and the buttock, 4cm below and parallel to injury No.23.

25. Contusion 7x1.5x0.3cm oblique on right side of hip, 4cm below the rim of hip bone.

26. Abraded contusion 5x3 cm on outer aspect of right thigh 1.5cm below injury No.25.

27. Incised wound 2x0.2x0.2 cm oblique on outer aspect of right thigh 8cm below injury No.26.

28. Contusion 5x1x0.4 cm with central pallor, vertical on outer aspect of right thigh 5cm below injury No.27.

29. Contusion 6x3x0.3cm with central pallor oblique on outer aspect and back of right thigh,

the front outer end being 7cm below injury No.28.

30. Abrasion 2x2cm on back of right leg 2 cm below the knee.

31. Contusion 10x2x0.3 cm vertical on back of right leg 15cm below the knee.

32. Incised wound 6x2.5x2cm on back of right leg 38cm below the knee making a superficial cut on back aspect of the tibia.

33. Incised wound 4.5x1x1 cm on back of right leg 1cm below and parallel to inj. No.32.

34. Incised wound 7x1x1cm on back of right heel 4c below and parallel to inj.No.33.

35. Abrasion 6x6cm on back and inner aspect of right leg 16cm below the knee.

36. Incised wound 5.5x2x2cm on the back of left ankle, 7cm above the heel.

37. Contusion 6x1.5x0.3cm oblique on back and inner aspect of left thigh 9cm above the knee.

38. Abraded contusion 18x1.5x0.2cm, horizontal over the left side of abdomen and hip, just above the rim of hip bone.

39. Abrasion 3x2cm on left side of abdomen 4cm above rim of hip bone.

40. Contusion 2x2x0.3cm on left side of trunk 15cm below armpit in midaxillary line. On dissection, the 5th and 6th rib of left side was found fractured. The left chest cavity contained 30 ml. of blood stained fluid. The left lung was found partially collapsed.

41. Contusion 10x6x0.3cm over the back and outer aspect of left hand just below the wrist.

42. Abrasion 1.5x0.2cm oblique on inner aspect of left forearm 8cm above wrist.

43. Abrasion 2x0.2cm oblique on back and inner aspect of left forearm 3cm above injury No.42.

44. Abrasion 2x1cm on back of left forearm 2.5cm below the elbow.

45. Abrasion 3.5x2.5cm on back and outer aspect of left elbow.

46. Contusion 7x5x0.3cm on inner aspect of left elbow and adjacent part of the arm.

47. Contusion 18x3x0.3cm with central pallor (1.5cm) oblique on front of left arm, the upper outer end just below tip of shoulder.

48. Contusion 8x3cm on back and outer aspect of left arm 2.5cm below tip of shoulder.

49. Multiple small abrasions over an area 2.5x2cm over the tip of left shoulder.

50. Lacerated wound 6x1.5cm bone deep oblique on back of head, the left lower end being 8cm behind the middle of root of left ear and the right upper end 4cm to right of midline at level of occiput with an area of contusion 7x5cm around. Underneath the skull and meninges were intact. Brain was congested.

51. Incised wound 2.5x0.2x0.1cm oblique on left side of face 2.5cm in front of the ear.

52. Abraded contusion 2.5 x 2 cm over the left

cheek.

53. Lacerated wound 1.5x0.5x0.2 cm oblique across the bridge of nose 1cm below its root.

54. Abraded contusion 2x1cm over the outer 3rd of left eyebrow.

55. Contusion 3x2x0.3cm on right side of face 2 cm outer to angle of eye.

56. Contusion 3x3cm involving the whole thickness of upper half of pinna of right ear.

57. Contusion 8x4x0.5cm horizontal over outer aspect of right arm 10 cm below tip of shoulder.

58. Contusion 7x3x0.3 cm oblique on front and outer aspect of right arm 6cm below injury No.57.

59. Contusion 5x1.5x0.3cm on outer aspect of right arm, 2.5cm outer to and parallel to injury No.58.

60. Contusion 8x4x0.3cm on front and outer aspect of right forearm 7cm above wrist.

61. Contusion 8x2x0.4cm horizontal on front of chest 3 cm to left of midline and 18cm below the collar bone.

62. Multiple small contusion over an area 15x4cm on right side of chest 10cm outer to midline and 13cm below the collar bone.

63. Multiple small abrasions and abraded contusions over an area 22x9cm on front of right chest and abdomen, 6cm to right of midline and 1cm below the costal margin. On

dissection, the abdominal cavity contained 500ml. of fluid blood. The liver showed multiple superficial lacerations involving its right lobe.

64. Abrasion 5x3cm on front of right thigh 10cm below hip.

65. Contusion 10x2cm horizontal on front and outer aspect of right thigh 17cm below injury No.64.

66. Abrasion 3x0.3cm oblique on front of right thigh 7cm below injury No.65.

67. Abrasion 1.5x1cm on front of right knee.

68. Incised wound 4x2x2.5cm horizontal on front of right leg 7cm below the knee cutting into the tibia for a depth of 2.5cm.

69. Incised wound 2.5x1.5x1cm oblique on front of right leg 8cm below injury No.68.

70. Contusion 7x4x0.3cm on front and outer aspect of right leg adjacent to injury No.69.

71. Lacerated wound 2x0.5x0.3cm on inner aspect of left ankle.

72. Multiple small abrasions over an area 4x5cm on front of left knee.

73. Lacertated wound 3x1x0.3cm oblique on front of left leg 11cm below the knee.

74. Lacerated wound 5x2x0.4 cm on front of left leg 4cm below injury No.73.

Underneath injuries 73 & 74, the leg bones were found fractured and fragmented.

75. Incised wound 2.5x0.5x0.3cm on front and outer aspect of left wrist.

Air passages were congested. Lungs were pale and partially collapsed. Stomach was half full with partly digested soft meat and other unidentifiable food materials having no unusual smell, mucosa was normal. Spleen was wrinkled and pale. Brain and adrenals were congested. All other internal organs were pale, otherwise appeared normal. Urinary bladder was empty, normal."

The opinion as to the cause of death as mentioned in the postmortem certificate is that the deceased died of the injuries sustained. No specific injury was mentioned in the postmortem certificate as to the cause of death. PW6 during examination stated that Injury Nos.40 and 63 are independently sufficient in the ordinary course of nature to cause death. He also stated that injury Nos.73 and 74 are also likely to cause death. Injury Nos.32 and 68 can also contribute the cause of death. He further stated that all the incised wounds can be caused by weapons like MO4 series and contusions could be caused by a wild stick like MO5 series. The above postmortem certificate shows that the deceased was brutally murdered by causing several injuries on him.

3. Now, we will come to the evidence of PW1. PW1 is the wife of the deceased and she is a natural witness as incident started from her house at night about 10.30p.m. on 19.3.1997. On 20.3.1997 at 5 a.m. she lodged Ext.P1 F.I. Statement before PW17 head constable. PW1 deposed that on 19.3.1997 at 10.30 p.m. herself, deceased Madhu, her mother and her son were talking each other by sitting inside the house of PW2 and at that time A1 to A5 trespassed into the house. Then A4 beat the deceased with a stick on his buttocks, A2 cut him with a chopper on his head and thereafter her husband was dragged towards the courtyard of the house and then caused him to stand in the mud wall on the courtyard of the house, closed his mouth with the lungi worn by the deceased. She also deposed that there was a sword in the hand of A1, a chopper in the hand of A2, a sword in the hand of A3 and A4 to A9 were holding wild sticks and all of them beat and cut the deceased several times. She further deposed that when her son attempted to obstruct them, he sustained injuries on his right eye and A2 pushed herself and her son on the ground and when they again attempted to obstruct, A5 beat her on her shoulder and thrown her son, thereby he sustained injury on his hand. Thereafter they dragged the deceased away and seeing the same herself and her son ran after them. It is also stated that the

deceased was dragged along the channel in front of their house and then put him at a place called Plavila and then tied him in a motorcycle and abandoned on the road side at Marappalam near Oottara temple and from there the deceased Madhu was taken to the Medical College Hospital, Thiruvananthapuram and on examination he was found dead.

4. Learned counsel for the defence argued that Ext.P1 cannot be taken as the first information statement because during cross examination PW1 stated that police recorded another statement before Ext.P1 F.I. Statement as she had admitted that police reached the scene of occurrence and questioned her. But, she also stated that she was not able to say anything to the Inspector. During cross examination she has stated that there was no occasion to say about the occurrence at 4 a.m. on 20.3.1997 and when she went to the police station, she was accompanied by her mother, PWs 4, 5 and 7. It is true that from the evidence it can be seen that there was tense situation between the two factions regarding the conduct of temple festival and on hearing the news police rushed to the place of occurrence. PW1 who has seen the brutal attack on her husband was unable to state anything and early morning at 5 a.m. she gave the

statement after confirming the death of her husband. We must understand the state of mind of a wife and relatives. They must have been shocked and terrified on seeing the brutal attack by a group of people, dragging him and also taking the deceased in the motorcycle. Even then there was not much delay. The deceased died at 12.30 a.m. in the early morning on 20.3.1997 and at 5 a.m. the first information statement was given. It cannot be stated that there was unexplained delay and a mere telephonic information will not constitute the first information statement. The police also rushed to the hospital where the deceased was admitted and thereafter PW1 came with the relatives to the police station and gave the first information statement. There is nothing unnatural and we are of the view that Ext.P1 can be accepted and prosecution case cannot be thrown out. On getting telephonic information, police came there and enquired about the same and the eye witness, wife of the deceased, was unable to talk anything and after the death statement was given. Even according to Exts.D14(a) and D14(b) police got information only at 12 p.m. The death was only at 12.30 p.m. and people were enquiring about what happened to the deceased at that time. When PW17 was cross examined, nothing was asked regarding the delay. PW18 when questioned stated that festival was going on in the

Oottara temple and police was busy with regard to the same and there is nothing in evidence to show that any signed statement was taken before Ext.P1. The alleged defects in Ext.P1 statement cannot be fatal at all. Even otherwise, there are eye witnesses to the incident.

5. PW2 who was also present at the time of occurrence deposed that A1 to A4, A6 and A8 entered into her house and pushed Madhu to the courtyard of the house who was at that time talking with PW1 and then the accused persons who brought sticks beat Madhu with sticks, the accused persons who brought sword and chopper cut him with sword and chopper and when he raised alarm, the lungi worn by him was removed and then closed his mouth with that lungi. Thereafter Madhu was dragged towards the channel and dragged him towards Purampokku big channel and then dragged towards east. PW3, son of the deceased also gave similar evidence. He deposed that A1 cut his father with a sword on both of the ankles, A2 cut him with a chopper on his head and nose and A3 cut him with a sword on all parts of his body. PW4 was a neighbour. According to him, on 19.3.1997 between 10 and 10.30 p.m. A1 to A4 along with another person dragged Madhu from the varandah of the house of

PW2 to the courtyard of the house and from the courtyard he was dragged to the channel (by-lane). She also stated that she saw the aforesaid persons cutting and beating Madhu. At that time PWs 1 to 3 were present. She flashed the torch light and then A3 uttered obscene words against her and therefore she did not go towards the place of occurrence. She further stated that A1 and A3 were having swords. Ext.P15 scene mahazar shows that from the courtyard there is a footstep in `L' shape having a length of 8 metres 75 cms towards east and from there towards north leading to Pandarakuzhy lane. In the courtyard as well as in the lane broken wild sticks were found lying being scattered and from that sticks four green sticks and two dried blood stained sticks were seized. In the lane there were dried blood stains here and there. It is further stated that one metre 80 cms north west from the portion of the Plavila road where Pandarakuzhy lane joins also, there is dried blood stains and that a shirt of blue colour with sand is also found lying there. PWs 5, 9,10 and 12 are the attesting witnesses for the recovery of MO4 series under Exts.P7 and P10 seizure mahazars on the basis of the confession made before PW18 Investigating Officer by A1 and A3. It is true that the earlier incident with regard to CW4 and 12 was not proved because CW4 reported dead and CW12 went to Gulf.

6. Evidence of PW5 also supports the case of the prosecution. She is the sister of one Aji. Aji is residing on the immediate north of her house. PW5 deposed that on the date of occurrence at about 9.30 p.m. her brother Aji came to her house. While they were taking dinner, A1 to A4 and others came to her house. They caught hold of her husband Gopalakrishnan misunderstanding that he is Aji and when she asked the accused for what purpose they came there, they told her that they had to see Aji and there is some problem. Aji who was present there escaped from the house, even though the accused persons attempted to cut Aji. She also stated that thereafter the accused persons went to the house of deceased Madhu and one lady named Subashini came and informed her that some persons inflicted cut injuries to Aji after taking him at Plavila road and therefore she went there and looked and then she could understand that it is not Aji but Madhu who was beaten and cut. PW5 is an independent witness. Evidence of PW9 shows that on 19.3.1997 between 9 and 9.30 p.m. while he was standing in the ground of the Oottara temple where festival is going on, he saw A1, A3, A4 and A5 talking together and there was also A2, A6 and A7 and that he saw A1, A3, A4 and A5 going towards east

in a bullet motorcycle which was found stopped there and in between 11 and 11.30 p.m. the motorcycle returned there being driven by A1. He further stated that in the middle of the motorcycle a person was found lying and A3 by sitting in the back seat of the motorcycle was catching hold of that person, that the neck of the person was shaking and that the motorcycle was driven towards Marappalam along Vizhinjam-Poovar road. After some time, the remaining two persons who had gone in the motorcycle came by walking. The number of the motorcycle was KRH 938 and it belonged to A4. There were injuries and blood on the entire body of the said person and at that time he could not understand who was the said person, but, after 10-15 minutes a person came and told him that Madhu is lying at Marappalam after sustaining cut injuries and he gave water to him and then the persons who brought Madhu there uttered obscene words against him. From cross examination of PW9 it has been brought about regarding the two factions with regard to the management of temple. After seeing the demeanor of the witness, the trial court believed the evidence of PW9. PW10 identified A1, A3, A4 and A6. He also stated that after 10 p.m. while he was taking tea from a teashop in the side of the road infront of the temple, three persons came there in a bike and they were A1 and A3 and in the

middle of the bike there was another person sitting and they went towards Marappalam. He stated that the motorcycle was driven by A3 and it is A1 who was sitting behind the person who was sitting in the middle of the motorcycle. He also stated that after some time, he went to Marappalam and saw Madhu lying in the side of the road and there were injuries on the body of Madhu. Then he could understand that it was madhu who was found sitting in the middle of the motorcycle. PW18 recovered the motorcycle bearing registration No.KRH.938 from the house known as Revathy house under Ext.P10 seizure mahazar. It was found abandoned in the southern courtyard of the house known as Revathy house in Oottara. PW14 attestor to Ext.P10 mahazar supported the prosecution case. It is an Enfield Bullet Motorcycle. After analysis of the evidence it was stated that totality of the evidence only stated about A1 and A3. PWs, 1, 2 and 3 also stated about the overt acts of A1 and A3. It is A1 and A3 who were carrying Madhu in the motorcycle. PWs 8, 9 and 11 also spoke about A1 and A3 carrying Madhu in the motorcycle. In the above circumstances, according to the trial judge, prosecution failed to prove the case against A2, A4, A6 and A9 beyond reasonable doubt.

7. Another contention raised by the appellants is that since only two persons were convicted and others were not convicted and no punishment was imposed under Section 149 IPC, conviction under Section 302 read with 34 IPC alone is not correct. It is true that State has not filed any appeal and we are not satisfied with the acquittal of some of the accused as other than A1 and A3 a group of people formed themselves into an unlawful assembly and went to the house of the deceased and committed the offence. Postmortem certificate shows that deceased was butchered. In this connection, we refer to the decision of the Hon'ble Apex Court in **Harshadsingh Pahelvansingh Thakore** v. **State of Gujarat** ((1976) 4 SCC 640) wherein it was held as follows:

> "..... When a murderous assault by many hands with many knives has ended fataly, it is legally impermissible to dissect the serious ones from the others and seek to salvage those whose stabs have not proved fatal. When people play with knives and lives, the circumstances that one man's stab falls on a less or more vulnerable part of the person of the victim is of no consequence to fix the guilt for murder. Conjoint complicity is the inevitable inference when a gory group animated by lethal intent accomplish their purpose cumulatively. Section 34 IPC fixing constructive liability conclusively silences such a refined plea of extrication.

(See: **Amir Hussain** v. **State of UP** ((1975) 4 SCC 247) and **Maina Singh** v. **State of Rajasthan** ((1976) 2 SCC 827)."

However, in the absence of an appeal, we are not considering the evidence against other accused who were acquitted in this case. The court below found A1 and A3 guilty under Section 302 read with section 34 IPC. Absence of charge under section 34 is not fatal by itself unless prejudice is established. (**William Staney** v. **State of M.P.** (AIR 1956 SC 116) and **Dhanna** v. **State of M.P.** (AIR 1996 SC 2478). Section 34 is applicable even if no injury has been caused by a particular accused by himself. For applying section 34, it is not necessary to show that some injuries are caused by the accused. (**Chinta Pulla Reddy** v. **State of A.P.** (AIR 1993 SC 1899). Section 34 is only a rule of evidence and does not create a substantive offence. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. The existence of a common intention amongst the participants in a crime is the essential element for application of this section. The individual acts may be different in character, but, must have been actuated by one and the same common intention in order to attract the provision. (**Ashok Kumar** v. **State of Punjab** (AIR 1977 SC 109) followed in **Anil Sharma and others** v. **State of Jharkand**

((2004) 5 SCC 679).Here, overt acts of A1 and A3 in furtherance of their common intention of annihilating the deceased is clear from the evidence.

8. It is proved in this case that on the basis of confession statement of A1 and A3 MO4 swords were found out and that evidence is admissible against them. It is A1 and A3 carrying the dead body in the motorcycle. The witnesses were examined in the court after about seven years of the incident. Yet there is only minor contradictions. There is no material contradictions in the evidence of the witnesses. There is no merit in the contention that so much injuries were caused only to inflict grievous hurt to threaten the deceased. The fact that even after inflicting the injury A1 and A3 had carried the injured person and thrown the body before death also shows that A1 and A3 shared the common intention of murdering him. Further, there were clear overt acts done by A1 and A3 which were proved by the witnesses. The totality of the evidence would show that the trial judge was correct in convicting the appellants (A1 and A3) for the brutal offence committed by them. The fact that deceased was inflicted with injuries very cruelly in front of his wife, mother and sons and was further dragged from there while he was sitting in the house at night talking with his wife and thereafter further injuries were inflicted and then the injured body was abandoned shows the cruel

nature of the act. Even though such a brutal act was committed, only lesser sentence that can be imposed under Section 302 was imposed. Conviction and sentence under Section 449 read with section 34 IPC is also justified. We see no ground to interfere with the conviction and sentence imposed in this case.

The appeal is dismissed.

J.B.KOSHY
JUDGE

K.P.BALACHANDRAN
JUDGE

tks